

1)
2 Plaintiff,)
3 vs.)
4 KIAHUNA GOLF CLUB, LLC, ET)
AL.,)
5 Defendant.)
6 _____)
7 SPORTS SHINKO CO., LTD., a) CV 04-00127 ACK-BMK
Japanese corporation in)
8 reorganization, through)
KEIJIRO KIMURA, its Deputy)
9 Trustee,)
10 Plaintiff,)
11 vs.)
12 OR HOTEL, LLC, a Hawaii)
limited liability company,)
13 Defendant.)
14 _____)
15 SPORTS SHINKO (USA) CO.,) CV 04-00128 ACK-BMK
LTD., a Delaware)
16 corporation,)
17 Plaintiff,)
18 vs.)
19 MILILANI GOLF CLUB, LLC, a)
Hawaii limited liability)
20 company,)
21 Defendant.)
22 _____)

TRANSCRIPT OF PROCEEDINGS
BEFORE THE HONORABLE ALAN C. KAY
UNITED STATES DISTRICT JUDGE

1 APPEARANCES:

2 For the Plaintiffs PAUL ALSTON, ESQ.
3 and Counter Claimants: GLENN T. MELCHINGER, ESQ.
4 Alston Hunt Floyd & Ing
5 American Savings Bank Tower
6 1001 Bishop Street, Suite 1800
7 Honolulu, Hawaii 96813

8 For the Defendant: ROBERT A. MARKS, ESQ.
9 WARREN PRICE, III, ESQ.
10 Price Okamoto Himeno & Lum
11 Ocean View Center
12 707 Richards Street, Suite 728
13 Honolulu, Hawaii 96813

14 For the Defendant and WILLIAM A. BORDNER, ESQ.
15 Third-Party Plaintiff: JOHN REYES-BURKE, ESQ.
16 Burke McPheeters Bordner & Estes
17 Pacific Guardian Center, Mauka Tower
18 737 Bishop Street, Suite 3100
19 Honolulu, Hawaii 96813

20 Official Court Reporter: Sharon Ross, CSR, RPR, CRR
21 United States District Court
22 300 Ala Moana Blvd., Room C-283
23 Honolulu, Hawaii 96850
24 (808) 535-9200

25 Proceedings recorded by machine shorthand, transcript produced
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1 MONDAY, MARCH 20, 2006 1:30 P.M.

2 COURTROOM MANAGER: Calling Civil No. 04-00124

3 ACK-BMK, Civil No. 04-00125 ACK-BMK, Civil No. 04-00126

4 ACK-BMK, Civil No. 04-00127 ACK-BMK and Civil No. 04-00128

01:32PM 5 ACK-BMK. This is Sports Shinko Company versus various
6 defendants. This hearing has been called for KG defendants'
7 motion for summary judgment, defendant Franklin K. Mukai's
8 joinder, motion to strike joinder by defendant Mukai and also
9 the motion to strike.

01:33PM 10 Counsel, your appearances for the record, please.

11 MR. ALSTON: Good afternoon, Your Honor. Paul Alston
12 and Glenn Melchinger appearing for the plaintiffs.

13 THE COURT: Good afternoon.

14 MR. MARKS: Good afternoon, Judge Kay. Robert Marks
01:33PM 15 and Warren Price for the KG parties.

16 THE COURT: Good afternoon.

17 MR. BORDNER: William Bordner and John Reyes-Burke for
18 defendant Mukai.

19 THE COURT: Good afternoon. Please be seated.

01:33PM 20 Counsel have been working on this case for several years, and
21 I've only been exposed to it for several days. So, if you'd
22 bear with me, I have a few questions I'd like to ask of
23 Mr. Alston first. I feel that I've just gotten through,
24 perhaps, the first chapter of this, which appears to be a very
01:33PM 25 lengthy book.

1 MR. ALSTON: Indeed, Your Honor.

2 THE COURT: I notice that in some of these cases
3 Sports Shinko (USA) is the plaintiff and in some Sports Shinko
4 Japan is the plaintiff. Why is that?

01:34PM 5 MR. ALSTON: It depended on where the debt resided,
6 Your Honor. In some instances, Sports Shinko (USA) was a
7 direct creditor. In other instances, Sports Shinko Japan was a
8 creditor.

9 THE COURT: I thought it -- I thought the debt came
01:34PM 10 down through Sports Shinko Japan who was the borrower from the
11 Japanese banks and it came down from one level to another.

12 MR. ALSTON: Often, that happened, Your Honor; but
13 sometimes money was lent by Sports Shinko Japan directly to the
14 American entities. And so, in some instances we had a claim
01:34PM 15 that could be brought by Sports Shinko Japan.

16 THE COURT: Okay. And who owns the balance of SS --
17 or Sports Shinko (USA)?

18 MR. ALSTON: Now, it is all owned by SS-J.
19 Everything -- everything has now been consolidated in -- as a
01:35PM 20 result of the bankruptcy, as I understand it, everything has
21 now been consolidated. The outside shareholders are all --
22 have all been eliminated; and it's a monolithic hierarchy.

23 THE COURT: But at the time that these alleged
24 fraudulent transactions took place, who owned the balance of
01:35PM 25 SS-USA?

1 MR. ALSTON: At that time, as I understand it, there
2 were other companies that were controlled by Mr. Kinoshita. I
3 don't have the specific names in my mind at this point, but I
4 can provide that to you if you would need it.

01:35PM 5 THE COURT: Are they companies owned by Toshio?

6 MR. ALSTON: Yes, Your Honor, or the Kinoshita family.

7 THE COURT: And I never did see any reference to the
8 dollar amount of the loans to the subsidiaries.

9 MR. ALSTON: In the aggregate, Your Honor, it was over
01:36PM 10 100 million. I can't specifically break it down for you as I
11 stand here now; but I -- we can supply that for you, again, if
12 you're interested. It was substantially in excess of the price
13 paid by KG and its -- or KG's affiliates. And it was
14 substantially in excess of the value even as we've described it
01:36PM 15 in our papers.

16 THE COURT: Now, would it be fair to characterize your
17 client's position as Toshio seeing that SS-Japan and the SS
18 empire on its way to bankruptcy transferred these properties in
19 Hawaii to the KG defendants that are priced substantially below
01:37PM 20 the fair market value but, before doing so, encumbered them
21 with management agreements with a termination fee of \$3-1/2
22 million?

23 MR. ALSTON: That's correct, Your Honor.

24 THE COURT: So, would it be fair to say that the
01:37PM 25 benefit -- the contemplated benefit to Toshio would be a \$3-1/2

1 million cancellation fee?

2 MR. ALSTON: It would be a series of cancellation fees
3 that, in the aggregate, totaled \$3-1/2 million.

4 THE COURT: Right.

01:37PM 5 MR. ALSTON: That's right. And as to one of them, the
6 one that was paid, if you will, by the transfer to RMS related
7 to the Maui golf course properties, that was the subject of
8 the -- the fraudulent transfer claim in State Court which was
9 compromised or settled by the return of the property that was
01:38PM 10 paid in lieu of the fee.

11 THE COURT: So, what would motivate Toshio to sell or
12 transfer the properties to the KG defendants for less than
13 \$3-1/2 million under the fair market value?

14 MR. ALSTON: I believe that the answer would lie in
01:38PM 15 the ability to close the transaction before the bankruptcy
16 actually occurred. It didn't matter what the property was
17 being sold for. The question was whether a deal could be
18 consummated before the -- before the bankruptcy occurred.

19 I -- whether there was something more in the way of an
01:39PM 20 unstated, undisclosed back-end benefit to Mr. Kinoshita and his
21 children or others in his family, we do not know. Certainly
22 one has to ask, and during the depositions we will ask whether
23 there was any benefit that was going to come after closing
24 without disclosure to either the trustee or the creditors.

01:39PM 25 THE COURT: I thought he had already been deposed.

1 MR. ALSTON: Mr. Kinoshita has been, but I'm talking
2 about disclosure -- depositions of the KG parties.

3 And we are still waiting, as we had explained in our
4 56(f) request, for disclosure of information on Satoshi

01:40PM 5 Kinoshita's computer which mysteriously crashed shortly after
6 the con -- the transactions were consummated. And we've been
7 trying to get e-mail and other material that was off -- on his
8 hard drive, which is where we suspect that we might find that
9 sort of information.

01:40PM 10 But as I stand here now, I have no -- no evidence that
11 I could point to that there was, in fact, some further or
12 additional illicit benefit; but I think the principal benefit
13 is that if they closed quickly, then assets could be
14 transferred in satisfaction of the -- of these manage -- the
01:40PM 15 termination of the management contracts, as happened with the
16 Maui property.

17 THE COURT: I could see that if he sold the properties
18 for, say, less than a million dollars or so, that would
19 expedite the sale; but according to the chart in your
01:41PM 20 opposition --

21 MR. ALSTON: Yes, sir.

22 THE COURT: -- the difference between the offers that
23 had been made by other parties and the amount that was received
24 by the SS companies was 30 -- over \$30 million.

01:41PM 25 MR. ALSTON: That's right. And so, I -- as I said,

1 I --

2 THE COURT: You don't need to reduce the price \$30
3 million to expedite a sale.

4 MR. ALSTON: Well, the question is how many -- if
01:41PM 5 you're going to turn away every other prospective buyer, as
6 they did, and if you're going to consummate a sale of every
7 company within less than two weeks with virtually no due
8 diligence, then you'll take what you can get, I suggest, rather
9 than -- you know, there was no time to find someone else.

01:41PM 10 And you can see that in the way, for example, the
11 Kauai property was handled where early in January Satoshi
12 Kinoshita signs a DROA to sell the Kauai property for \$10
13 million. Three days later, they sign another contract to sell
14 everything to the KG entities. And instead of selling the
01:42PM 15 Kauai property for ten, they sell it for approximately three.
16 And the only explanation for that is that they're going to
17 consummate the sale before the bankruptcy can occur and before
18 the Japan trustee can come in and take control.

19 And it -- it's a fire sale, I mean; and whether the
01:42PM 20 \$3-1/2 million in management termination fees is the only
21 consideration or, as I said, whether there was something else
22 that is out there yet to be discovered, we don't know. But
23 I -- you know, it certainly raises a question when the spread
24 between market value and the sales price is so big. It can
01:43PM 25 only be because, you know, they feel some extraordinary benefit

1 from selling immediately in an extraordinarily hasty manner.

2 THE COURT: I mean, by such a big difference, \$30
3 million --

4 MR. ALSTON: Right.

01:43PM 5 THE COURT: -- it would only attract attention to any
6 fraudulent intent that may have been involved.

7 MR. ALSTON: Indeed.

8 THE COURT: So, it would work against his interests.

9 MR. ALSTON: It would -- indeed. I mean, I suppose in
01:43PM 10 that respect, that's right. I mean, the spread was so big that
11 it would have to draw some attention; but whether they counted
12 upon the Japan trustee paying little attention to what was
13 happening in Hawaii or whether they thought that in the context
14 of the overall collapse of the Sports Shinko enterprise, where
01:43PM 15 there was literally hundreds of millions of dollars of debt in
16 Japan, that this -- this piece in Hawaii was relatively small
17 or whether they thought that a Japanese bankruptcy trustee
18 would simply -- would not look behind any of the transactions
19 and try to -- and try to, through discovery and through an
01:44PM 20 investigation by a CPA, uncover the difference between market
21 value and sales value, I don't know.

22 It's hard -- it's hard to know what motivated them,
23 but we do know from the documents we've supplied that were
24 generated by Mr. Mukai that there was concern about being
01:44PM 25 caught in a fraud.

1 THE COURT: Now, was the Goldman Sachs affiliate aware
2 of this alleged fraud before it purchased the properties -- or
3 before it purchased the SS companies?

4 MR. ALSTON: Right. The litigation was ongoing for a
01:45PM 5 substantial period of time before the sale of the companies
6 through the Japan bankruptcy.

7 THE COURT: And the Goldman Sachs affiliate purchased
8 the stock from the trustee in bankruptcy or the receiver or --

9 MR. ALSTON: Actually, as I understand it, it's a
01:45PM 10 little bit different than one might expect in a U.S.
11 bankruptcy. Apparently the original stock is canceled and new
12 stock is issued out of the bankruptcy. So, it's not a matter
13 of the same shares passing from one hand to another and ending
14 up in the hands of Southwind, which is the name of the Goldman
01:45PM 15 Sachs entity.

16 THE COURT: Like being born again.

17 MR. ALSTON: Somewhat, yes, uh-huh. I mean, it's not
18 the same shares that have passed through.

19 THE COURT: So, before the bankruptcy was closed,
01:46PM 20 everyone, including the external creditors, were aware of the
21 ongoing litigation in the state court?

22 MR. ALSTON: I believe so, Your Honor. I believe
23 certainly the trustee, the assistant trustee and other people
24 involved with the administration of the bankruptcy were aware
01:46PM 25 because we provided reports to them. I can't say specifically

1 chapter and verse what was told; but I believe that they all
2 were aware, yes, sir.

3 THE COURT: But as I understand it, you're not seeking
4 standing as a creditor through the external creditors or the
01:46PM 5 trustee in bankruptcy. You're seeking standing only through
6 the internal corporate loans; is that right?

7 MR. ALSTON: Well, based on the internal corporate
8 loan, that's right; but what we're saying is that Southwind has
9 succeeded to the interests controlled by the bankruptcy
01:47PM 10 trustee. And so, in that -- in that respect, he is not the
11 normal successor in interest to that -- that might be bound by
12 equitable defenses.

13 Rather, in the language of the O'Melveny case, which
14 is 61 F.3d, as Judge Kozinski put it, we are -- we are standing
01:47PM 15 here representing an innocent successor by operation of law
16 since they have succeeded to the interests of the trustee.

17 THE COURT: So, would it be fair to say that Goldman
18 Sachs' affiliate -- and their name is what?

19 MR. ALSTON: Southwind.

01:47PM 20 THE COURT: Southwind?

21 MR. ALSTON: It's a long -- it's a long name, but the
22 first --

23 THE COURT: Okay.

24 MR. ALSTON: -- the first part of it is Southwind.

01:48PM 25 THE COURT: So that when they purchased the SS

1 companies, they took into consideration that there may be some
2 further recovery in the Hawaii State Court litigation?

3 MR. ALSTON: So I would believe, Your Honor. That's
4 right.

01:48PM 5 THE COURT: And in this -- the State Court litigation
6 is now settled?

7 MR. ALSTON: The one case in State Court has been
8 settled. We're only -- at least all the monetary terms have
9 been resolved and we've recovered and sold the Maui property.
01:48PM 10 The one thing that remains there is that, as part of the
11 settlement, Satoshi Kinoshita was required to recover the data
12 on his computer that crashed and turn that over to us. And
13 that's the one small piece that remains unconcluded.

14 THE COURT: There seemed to be some allusion to -- in
01:48PM 15 one of the papers that instead of taking the \$3-1/2 million
16 cancellation fee, he took a Maui Pukalani residence.

17 MR. ALSTON: No, Your Honor. There was -- as I
18 mentioned before, there was a series of cancellation fees that
19 aggregated \$3-1/2 million. The cancellation fee on the Maui
01:49PM 20 prop -- the Pukalani property was paid in kind, if you will, by
21 giving him a residence which we subsequently sold for the
22 benefit of Southwind at a price of approximately \$575,000. And
23 so, the property was worth approximately the cash value of the
24 cancellation fee.

01:49PM 25 THE COURT: Thank you. I'll now let Mr. Marks proceed

1 with his motion.

2 MR. MARKS: Thank you, Your Honor. Your Honor, I have
3 only two very brief points to make. The first is that the law
4 does not permit a company to defraud itself and then make
01:50PM 5 itself whole from a third party.

6 Your Honor, if I may, I have a demonstrative aid that
7 might assist the Court. I've given it to Mr. Alston.

8 THE COURT: Very well. Do you have a copy for my
9 clerk, too? Thank you.

01:50PM 10 MR. MARKS: Never forget the clerk. Your Honor,
11 I've -- the facts stated on that document entitled "road map"
12 outline the key undisputed facts that are necessary in order to
13 grant this motion.

14 What the plaintiff has pled in the complaint and
01:50PM 15 conceded in discovery and further animated in the discussion
16 just now is that Toshio controlled all of the Sports Shinko
17 companies, including the creditor and the debtor; that he owned
18 all the Sports Shinko companies, including the creditor and
19 debtor; that Toshio told the Japan banks that he would sell the

01:51PM 20 Hawaii assets of Sports Shinko to pay the Japan bank creditor
21 of Sports Shinko Japan; that Toshio masterminded this grand
22 conspiracy that was supposed to net \$3-1/2 million. But
23 somehow I suppose the allegation is necessarily that Toshio
24 wasn't such a great conspirator because he only netted a house
01:51PM 25 that's apparently worth \$400,000. But apparently this

1 elaborate conspiracy was designed to defraud the Japan banks;
2 and in addition to all that, there's no dispute --

3 THE COURT: Well, while you're speaking about
4 conspiracy, when the KG defendant purchased the properties, did
01:51PM 5 they think that the prices were unreasonably below the fair
6 market value?

7 MR. MARKS: What KG believed is that they were buying
8 all the parcels, two hotels and three golf courses from a
9 company that they knew were having -- was having problems. And
01:52PM 10 they bought it in the immediate aftermath of September 11th
11 when the industry was very unstable and there were problems,
12 serious problems. They had been involved in prior
13 transactions --

14 THE COURT: What industry are you referring to?

01:52PM 15 MR. MARKS: The visitor industry, the golf industry.
16 People weren't coming to Hawaii at that point. It was a very
17 unstable market.

18 KG had also previously been involved in a transaction
19 with Shinowa on Maui where they were to buy assets there. And
01:52PM 20 it was a very long process and in the end there was a very
21 accelerated closing process and none of this seemed unusual to
22 KG.

23 They made an offer in December. The purchase and sell
24 agreement was executed some weeks later, and it closed fairly
01:53PM 25 quickly thereafter.

1 So, there is very much a question of fact about
2 whether the price paid was a fair price, especially considering
3 the sewage treatment plant; but we're willing to look past all
4 of that for the purposes of this motion, Your Honor, and
01:53PM 5 concede the facts as stated in the complaint are true.

6 THE COURT: Concede what fact?

7 MR. MARKS: That the price was too little. I mean,
8 we'll concede that for purposes of this motion. This motion
9 began as a Rule 12 motion, and we -- as more evidence was
01:53PM 10 developed to support it, it became a Rule 56 motion. And then
11 it was filed under Rule 56 because of the attachments.

12 THE COURT: I didn't hear you.

13 MR. MARKS: The motion was filed pursuant to Rule 56
14 because we had exhibits attached; but in our mind's eye as we
01:53PM 15 started this, it was a Rule 12(b)(6) motion.

16 THE COURT: What about the management agreements? Did
17 that cause you any thought, or your clients?

18 MR. MARKS: I don't believe it caused any thought at
19 all. Apparently KG was given an opportunity to agree to an
01:54PM 20 assignment of the management agreements, and it didn't. It
21 didn't accept the management agreements.

22 THE COURT: I mean, these management agreements were
23 just executed shortly before the sale, weren't they?

24 MR. MARKS: I don't know the dates of it. Probably, I
01:54PM 25 believe so. But the -- you know, the point is that the

1 management agreements were presented to KG; and if I understand
2 correctly, they declined to accept them. So --

3 THE COURT: And that caused the \$3-1/2 million fee to
4 the management company.

01:54PM 5 MR. MARKS: And KG acting in its own best interests
6 believed that it could pursue management in a more
7 cost-effective way without taking the assignment of those
8 agreements.

9 You know, there's nothing in that that I can see that
01:54PM 10 suggests any impropriety by KG at all. There were incumbent
11 managers at the golf courses and hotels. KG had the option to
12 accept or reject them, and they rejected them.

13 But most importantly, Your Honor, the sale of the KG
14 assets -- I'm sorry -- of the Sports Shinko (Hawaii) assets to
01:55PM 15 KG were specifically approved by Toshio. These are the only
16 material facts that are necessary to be -- to find in favor of
17 KG on this motion.

18 Sports Shinko's whole case presumes Toshio's complete
19 control of the Sports Shinko empire because without that
01:55PM 20 complete control, Sports Shinko Japan could not reach anywhere
21 into the corporate structure and sell remote subsidiaries'
22 assets to pay the Japan company's debts. This is, indeed, the
23 very heart of the plaintiff's case that Sports Shinko defrauded
24 itself.

01:55PM 25 This distorts fraudulent transfer law and turns it

1 into a vehicle to commit fraud rather than redress it. In a
2 fraudulent transfer case, Your Honor, at least two basic
3 showings are necessary before a transferee has exposure.

4 First, there's a creditor who is defrauded by a
01:56PM 5 debtor; and the second is an enforceable debt between them. In
6 an ordinary fraudulent transfer case, that would be an issue to
7 be contested between the parties who know about the debt, the
8 creditor and the debtor. And the transferee is insulated
9 unless there are findings that push the case toward a
01:56PM 10 fraudulent transfer case; that is, if the creditor was not
11 defrauded by the debtor or if there was no debt, there's no
12 claim against the transferee.

13 In this case where the fraud victim controls the fraud
14 perpetrator, all of this gets glossed over in a combined effort
01:56PM 15 by the debtor and the creditor to pursue the transferee. And
16 that's what's happened here. Fraudulent transfer law is turned
17 on its head, and a whole new species of fraudulent transfer
18 case is invented.

19 If Sports Shinko's theory is correct, we can expect
01:57PM 20 that sellers will sell their properties through a wholly owned
21 controlled subsidiary that is indebted to the parent company.
22 The sale will occur. The debt will not be repaid, and then the
23 seller's parent waits. And in a rising market, the seller's
24 parent then sues the buyer and picks the buyer's pocket for
01:57PM 25 additional money.

1 That's what's happened here. The seller defrauds
2 itself, and the transferee is left on the receiving end of a
3 lawsuit.

4 THE COURT: Apparently they had offers at that time.
01:57PM 5 We're not talking about a rising market. They had offers at
6 the time that exceeded \$30 million, what your clients paid for
7 the property.

8 MR. MARKS: There were no offers that were anything
9 like the offer that KG made because what KG offered to do was
01:57PM 10 to take the entire Sports Shinko Hawaii asset pool and acquire
11 them all at once. There was no other offer anything like that.

12 There was an offer for a golf course, an offer for a
13 hotel; but there was no offer for all the combined assets. And
14 there are, of course, economies of scale that come with that
01:58PM 15 kind of offer in a very uncertain market after September 11th.

16 THE COURT: They still had the offers.

17 MR. MARKS: But the seller didn't accept those offers.

18 THE COURT: (Inaudible.)

19 MR. MARKS: They apparently -- and Mr. Alston has
01:58PM 20 information about this, Your Honor. I mean, we've shown
21 through the privilege log that Toshio was deposed for three
22 days by Mr. Alston. I imagine that Mr. Alston has
23 Mr. Kinoshita's answer to these questions, but he's treating it
24 as work product. So, we're left to wonder ourselves. I
01:58PM 25 imagine that Mr. Kinoshita has an answer for these questions,

1 Your Honor.

2 Your Honor, in this case there are no innocent
3 shareholders. The entire empire was owned by Toshio and his
4 three sons. There are no innocent arm's-length creditors in
01:59PM 5 this case, only a creditor who was complicit in the so-called
6 fraud. There's no trustee; and there's no receiver, as the
7 Court observed.

8 And this would be a very different case if this were a
9 case by an arm's-length creditor or a trustee or a receiver.
01:59PM 10 Instead, all we have here is a so-called creditor alleging that
11 it was defrauded by a company that it absolutely controlled,
12 suing a transferee because it says the transferee paid too
13 little.

14 None of the parties in this litigation have found a
01:59PM 15 single case involving a fraudulent transfer with intercompany
16 debt. If these novel cases stand, it will be an unwarranted,
17 unprecedented and dangerous extension of fraudulent transfer
18 law. Uniform Fraudulent Transfer Act is a very broad statute,
19 but there is no way that the Legislature intended this statute
01:59PM 20 to be used as a device to commit fraud against a transferee.

21 My second point, Your Honor, is one that also came up
22 briefly during your colloquy with Mr. Alston. There's no
23 damaged party here. Sports Shinko wasn't damaged. If you look
24 at the handout that I gave you under the portion called
02:00PM 25 so-called debt, that's a quote from Paragraph 12 of the second

1 amended complaint.

2 Sports Shinko Japan borrowed money from a Japanese
3 bank. It then lent it to subsidiaries and ultimately to Sports
4 Shinko Mililani, the debtor in 4-128.

02:00PM 5 If this bank debt was resolved in bankruptcy, as it
6 should have been because it was a debt of Sports Shinko Japan,
7 the parent company and the debtor to the banks, the fact that
8 the proceeds of the loan were in turn --

9 THE COURT: What about Sports Shinko (USA)? I think I
02:01PM 10 heard Mr. Alston say that some of the loans from the Japanese
11 banks were to Sports Shinko (USA).

12 MR. MARKS: That's correct, Your Honor. Some --

13 THE COURT: It didn't go into bankruptcy, did it?

14 MR. MARKS: USA did not, no; but the -- but the debt
02:01PM 15 in each of those cases was nonetheless the debt of Sports
16 Shinko Japan. It would -- in this case, for example, Japan
17 lent the money to USA; and USA in this case, in 128, lent the
18 money to Sports Shinko Mililani. It was still Sports Shinko
19 Japan's debt to a Japanese bank, and that was resolved in
02:01PM 20 bankruptcy.

21 The fact that the parent company chose to cycle the
22 money through to a Hawaii subsidiary doesn't make it any less
23 its debt to its Japanese bank. And if the Japanese bank was
24 paid in bankruptcy, the company can't be damaged because it
02:01PM 25 made a loan to itself that it didn't repay to itself. On the

1 balance sheet it would still net out to nothing.

2 Your Honor, as Mr. Alston acknowledged again today,
3 these cases are being pursued by Sports Shinko's new owner,
4 Goldman Sachs, for Goldman Sachs' benefit, not for a Japan

02:02PM 5 bank, not for an arm's-length creditor. This case is a sham by
6 Goldman --

7 THE COURT: You know, you use the term "arm's-length
8 creditor" in your opp -- in your motion; but I don't see that
9 term anywhere in the Uniform Fraudulent Transfer Act.

02:02PM 10 MR. MARKS: In fact, it's not, Your Honor. But may I
11 offer another demonstrative aid to illustrate the point?

12 THE COURT: You mean, Whiteacre and Blackacre again?

13 MR. MARKS: No, this one's different, much more
14 better. No Whiteacre here, Your Honor. Instead, we have an
02:03PM 15 arm to illustrate the arm's-length transaction.

16 Looking at the first page of that handout, this is how
17 a fraudulent transfer case ordinarily works. If you look
18 inside the dotted lines there, before there is any case against
19 a transferee, there needs to be a creditor who was defrauded by
02:03PM 20 a debtor and a debtor who has no defenses. That's normal.
21 That insulates the transferee from liability.

22 The reason that KG is prejudiced in this case where
23 it's an intercompany debt where the creditor and the debtor are
24 basically one and the same is illustrated on the second page.

02:03PM 25 Here we have a case where a creditor is very motivated

1 to say, and then does say, in effect, that it was defrauded by
2 itself. And we also have, in the memorandum in opposition, a
3 debtor stepping up to say, oh, we'll admit the debt even though
4 we can't find the promissory notes if they even exist; but
02:03PM 5 that's okay, we'll -- we, the debtor, will admit the debt if
6 that will help advance the case.

7 Well, of course, they'll do that, Your Honor. Their
8 interests are identical. And both of these factors prejudiced
9 KG. This is not a normal case under the UFTA because the
02:04PM 10 two -- the creditor and the debtor are uniformly controlled by
11 the same group, whether previously by Toshio or now by Goldman
12 Sachs.

13 This is why the UFTA is turned on its head by this
14 case because the transferee is not in a position to determine
02:04PM 15 what defenses the debtor might have.

16 We've asked Sports Shinko to produce the notes. We've
17 asked Sports Shinko to even identify the amounts of the debts
18 sued upon in each case; and to date, they haven't been able to
19 do that. And meanwhile --

02:04PM 20 THE COURT: Well, if this action had been brought by
21 the receiver --

22 MR. MARKS: We wouldn't be filing this motion, Your
23 Honor. This motion wouldn't work with a receiver. And
24 that's -- that's the delusion here, Your Honor, is that the
02:04PM 25 cases that Sports Shinko cites to support their case are --

1 exemplify the extraordinary powers of a receiver or a trustee
2 or a shareholder or an arm's-length creditor, but not an inside
3 creditor.

02:05PM 4 THE COURT: But in this case Southwind has purchased
5 from the receiver.

6 MR. MARKS: I'm not -- you know, I can't profess, Your
7 Honor, to be an expert in Japanese bankruptcy law. As I
8 understand it, new shares were issued. There's apparently a
9 very different procedure in Japanese corporate reorganization.

02:05PM 10 As I understand it, at the outset, from the time of
11 filing, the trustee searches for basically a sponsor; and the
12 sponsor ends up working the case through to the end and
13 acquiring the company in the end, I suppose, if all goes well.

14 I may not have this right, Your Honor. My ability to
02:05PM 15 read Japanese and understand Japanese corporate law is very,
16 very limited.

17 I don't think it's right to say that they took without
18 notice -- in fact, Mr. Alston concedes that they took with
19 notice of the state claim. What he doesn't acknowledge is
02:06PM 20 that, in addition, these federal cases were filed before the
21 acquisition by Southwind. So, Southwind also took with
22 knowledge of whatever jeopardy these cases bring.

23 From my point of view, the reasoning of O'Melveny fits
24 to a T. They knew about the problems of prior management; and
02:06PM 25 they discounted their purchase price, to the extent any of this

1 was even material, in a huge transaction that was primarily
2 based in Japan.

3 THE COURT: Well, maybe they paid more for it
4 considering that they might recover something from the federal
02:06PM 5 actions?

6 MR. MARKS: That would be, I think, unusual behavior
7 but perhaps.

8 THE COURT: Well, it's certainly not a -- I mean, if
9 anything, it's a potential asset, isn't it?

02:06PM 10 MR. MARKS: It shows an action, and I think it's
11 amenable to evaluation as having risk. And, again, Mr. Alston
12 can evaluate this case better than we can because of all the
13 discovery he's done of the Japanese actors that we haven't done
14 and that he won't share with us.

02:07PM 15 THE COURT: Well, you know, I was reading from a
16 decision by Judge Possner in another case; and he says, "But
17 the reason, of course, as the cases just cited made clear, is
18 that the wrongdoer must not be allowed to profit from his wrong
19 by recovering property that he had parted with in order to

02:07PM 20 thwart his creditors. That reason falls out now that Douglas
21 has been ousted from control of a beneficial interest in the
22 corporations. The appointment of the receiver removed the
23 wrongdoer from the scene. The corporations were no more
24 Douglas' evil zombies. Free from his spell, they became

02:07PM 25 entitled to the return of the moneys for the benefit not of

1 Douglas but of innocent investors that Douglas had made the
2 corporations divert to unauthorized purposes."

3 Now, that case is not on -- you know, precisely on all
4 fours; but wouldn't Southwind be put in the position of an
02:08PM 5 innocent investor?

6 MR. MARKS: Quite the contrary, Your Honor. It took
7 with notice of the problems associated with prior management.
8 I don't -- I think it takes -- and steps into the shoes of
9 prior management, quite the contrary, not like a trustee who
02:08PM 10 is, as the O'Melveny court explains, thrust into the shoes of
11 the prior control group. The owner makes a considered business
12 judgment and evaluates whether to acquire. And so, they are
13 fairly taking with knowledge and with the taint of the alleged
14 misconduct of the prior owners.

02:08PM 15 THE COURT: But apparently they presumably paid more
16 for it on account of that potential asset.

17 MR. MARKS: Your Honor, we haven't done any discovery
18 on this. We, in fact, tried to submit informal discovery to
19 the actors for Goldman Sachs in Japan who were responsible for
02:09PM 20 the acquisition; and we were basically shut down flat. We were
21 in an environment where Judge Kurren was encouraging the
22 parties to share information so that we could hopefully resolve
23 the case; but when we went to Japan to Southwind Realty Finance
24 (Cayman Company) and to principals at Goldman who were
02:09PM 25 intimately involved in the transaction, we were told to contact

1 them through The Hague Convention, they would not be responding
2 with any information.

3 I don't believe, Your Honor, just looking at the
4 dynamics of this company, that these overseas assets even got
02:09PM 5 onto the radar screen of Goldman Sachs. The big assets in play
6 in this acquisition, as I understand it, were in Japan.

7 But assuming they did, I don't think that there is any
8 equitable basis or legal basis to ascribe to the purchaser, who
9 takes with notice, anything other than the knowledge of the
02:09PM 10 predecessor actors for the company.

11 THE COURT: But it appears that once the receiver gets
12 into the act, then the purchaser takes and stands in the shoes
13 of the receiver.

14 MR. MARKS: I've never -- that hasn't been briefed.
02:10PM 15 I -- the first time I heard that that was the theory that
16 Mr. Alston was operating from was today during his statements
17 earlier today.

18 As we had understood it, they bought; they owned the
19 stock; they took with notice and they take with whatever warts
02:10PM 20 they acquire by virtue of the acts of prior management. I
21 think that's the law. Although, again, I haven't really looked
22 into it.

23 THE COURT: I mean, Judge Possner goes on to say, "The
24 defense of in pari delicto loses its sting when the person who
02:10PM 25 is in pari delicto is eliminated. And he's eliminated by the

1 receiver taking over the property.

2 MR. MARKS: You know, if -- there are any number of
3 doctrines in which to pigeonhole this motion -- KG's motion for
4 summary judgment. One of them is that there's no standing,
02:11PM 5 that Sports Shinko is suing as though it were the Japan bank or
6 the trustee.

7 THE COURT: That's the crux of your motion, isn't it?

8 MR. MARKS: That's right. But they're not that, as
9 the Court observed in the discussion earlier today with
02:11PM 10 Mr. Alston. They are now a stand-alone company that has
11 basically acquired new stock, replacing the old stock, of the
12 people that they allege were behaving in a fraudulent fashion.

13 So, what happens in that process that cures that, to
14 the detriment of a transferee, is beyond me. If you look at
02:11PM 15 fraudulent transfer law from a distance, ordinarily there's
16 nothing wrong with getting a good deal on a purchase. In a
17 free economy, that's encouraged.

18 The time when getting a good deal becomes actionable
19 is when there's a creditor who's defrauded. But this creditor
02:12PM 20 was acting with this debtor. And so, there is no equitable
21 basis. Comparing the rights of the creditor, who's an insider,
22 to the transferee, the balance shifts when the creditor and the
23 debtor are basically one and the same. And it just corrupts
24 the entire uniform fraudulent transfer scheme when you penalize
02:12PM 25 a transferee because a creditor and a debtor who are basically

1 the same entity say they've been defrauded. It just creates
2 havoc and turns the entire act upside down.

3 Is there anything more, Your Honor.

4 THE COURT: No, I think I've said enough. Thank you.

02:12PM 5 MR. MARKS: I hope I have, too. Thank you, sir.

6 THE COURT: Mr. Bordner, do you want to say something?

7 MR. BORDNER: Well, Your Honor, we simply have joined
8 in the motion that's before the Court today. My intention
9 wasn't to create a big brouhaha about joinder versus --

02:13PM 10 THE COURT: I have almost as many papers on that as --

11 MR. BORDNER: I must have struck a nerve somewhere.

12 THE COURT: -- I do on the motion itself.

13 MR. BORDNER: It must have struck a nerve somewhere.

14 But my intention was simply to file a joinder and to note to
02:13PM 15 the Court that the in pari delicto argument is just another
16 label to put on what essentially the argument has been through
17 the Kobayashi group.

18 THE COURT: Thank you. Mr. Alston?

19 MR. ALSTON: Thank you, Your Honor. First, let me
02:13PM 20 clarify some things. I may have misspoken with respect to the
21 relationship between SS-USA and SS-Japan and the reason why
22 both are plaintiffs here.

23 What I meant to say was that in some instances SS-J
24 was a direct creditor of the -- the entity that sold its
02:13PM 25 assets. In other instances, SS-USA was a direct creditor, not

1 because the Japanese banks had lent money directly to SS-USA
2 but because the money had flowed from the banks to Japan to
3 USA.

02:14PM 4 So, in every instance at the end of the day Japan was
5 the source of the money; but sometimes USA was itself a lender
6 and sometimes Japan was a lender.

7 THE COURT: I see.

8 MR. ALSTON: And sometimes both.

9 The second thing is Mr. Melchinger has corrected my
02:14PM 10 recollection of the Maui termination fee. In fact, that Maui
11 property was transferred to the person who was nominally in
12 control of RMS, the management company --

13 THE COURT: Mr. Nishida.

14 MR. ALSTON: -- Mr. Nishida, who I understand is now
02:14PM 15 working for KG and -- the KG companies; transferred it to
16 Mr. Nishida for a \$200,000 credit on the management fee. We
17 subsequently sold it due to a run-up in prices at 575, I
18 believe it was, or thereabouts; but it was not in full
19 satisfaction of that termination fee. It was just the property
02:15PM 20 that was on hand at the time to transfer.

21 Mr. Marks said that it must be that Toshio and his
22 sons were poor conspirators because they ended up with only the
23 Maui property in satisfaction of their \$3-1/2 million claim. I
24 don't believe there's any support for saying that. I think the
02:15PM 25 record is that with respect to the remainder of the \$3-1/2

1 million, there were claims for that that remained unpaid
2 because the bankruptcy overwhelmed them, not because they took
3 that in satisfaction of the debt.

4 Mr. Marks would have you look at this case as though I
02:15PM 5 represented Toshio and his sons and we were here in a closed
6 universe where no one outside the Kinoshita family was either
7 benefited or harmed by this array of below-market transfers.
8 That is simply not the case. We are here standing in the shoes
9 of the former bankruptcy trustee; and as you have indicated,
02:16PM 10 where a trustee or a receiver or someone else has stepped in,
11 the sting of the in pari delicto doctrine and other equitable
12 defenses, such as imputation, disappear.

13 We are entitled to, I suggest, pursue these claims
14 free of whatever equitable arguments might have been advanced
02:16PM 15 if the Kinoshitas had the change of heart that Mr. Marks is so
16 worried about and had come in to unwind their own transactions.

17 The other fundamental flaw in Mr. Marks' approach to
18 this is that he assumes that a fraudulent transfer claim can
19 only be made by a creditor who was actually defrauded by the
02:17PM 20 transfer in question. In fact, under Section 4(a)(1) of the
21 Uniform Fraudulent Transfer Act in Hawaii, a fraudulent
22 transfer claim can be brought if the transfer was made with
23 the -- excuse me, let me back up -- a fraudulent transfer claim
24 can be brought by a future creditor, one who did not exist when
02:17PM 25 the transfers occurred, if the transfer was made with the

1 actual intent to hinder, delay or defraud any creditor.

2 So, the creditor who's bringing the claim doesn't have
3 to be one who was defrauded at the time. It can be a creditor
4 who finds itself in that position weeks, months or even years
02:18PM 5 after the transfer was made.

6 And I suggest to you that, to use the born again
7 analogy, what the company -- the creditor companies are now is,
8 in effect, future creditors who are entitled to complain
9 because there was a fraud on -- on creditors. And for that
02:18PM 10 proposition, I would ask you to look at the Hawaii Supreme
11 Court's decision in the UFJ case where what they explained was
12 that under Japan law, a Japan creditor of a parent company
13 enjoys the right to drill down through layers of subsidiaries
14 and assert direct claims against lower-tiered subsidiaries
02:18PM 15 based on claims that arise in Japan.

16 And so, to the extent that we now have a new owner who
17 was a successor to the receiver who was protecting the
18 interests of the Japan creditors, we've got a -- somebody who's
19 been defrauded in the -- in the sense of 601(c)(4)(A), a future
02:19PM 20 creditor, all right?

21 The issues of who can sue here are not judged by
22 whether there was an arm's-length debt or not. As you pointed
23 out in discussing -- in your colloquy with Mr. Marks, the
24 Uniform Trans -- Fraudulent Transfer Act does not use the
02:19PM 25 phrase "arm's-length creditor." In fact, the term "creditor"

1 is defined as broadly as can possibly be imagined.

2 What Mr. Marks is talking about here is really
3 asserting equitable defenses to the claim. And for all the
4 reasons that we've argued, all the reasons that Judge Possner
02:20PM 5 explained and all the reasons that the Ninth Circuit has made
6 clear in the O'Melveny case where you have someone who steps in
7 as an innocent, they are entitled to pursue the claims.

8 And even though the names of the plaintiff companies
9 may be the same, we are, in fact, talking about new entities
02:20PM 10 under new ownership that are innocent of the kinds of
11 wrongdoing that Mr. Marks wants to attribute to -- and fairly
12 to Toshio Kinoshita and his sons.

13 Do you have any questions, Your Honor?

14 THE COURT: No, I don't have any questions. Thank
02:20PM 15 you.

16 MR. ALSTON: Thank you.

17 THE COURT: Mr. Marks?

18 MR. MARKS: Thank you, Your Honor, just a couple of
19 points. Judge Possner, in the passage that you read from,
02:21PM 20 presumes that there were innocent people who were defrauded.
21 In this case the only fraud was to the companies that Toshio
22 controlled and owned. The fraud left no innocent people in its
23 wake.

24 And it is unseemly and novel for this successor to the
02:21PM 25 trustee to be born again. The ordinary rule in American

1 jurisprudence is the successor management takes with the
2 knowledge of prior owners and prior managers. And in this
3 instance, in fact, this lawsuit and the State Court litigation
4 were pending at the time that Southwind or whichever Goldman --
02:21PM 5 I think there's actually some -- a high degree of confusion
6 about what Goldman company took. I believe Southwind took
7 initially, and it's been transferred multiple times since then.
8 But the point here is there's no innocent party to
9 redress. If this were, as Mr. Alston argues, the Japan bank
02:22PM 10 suing as it can pursuant to the UFJ case, suing in Hawaii to
11 recover from a subsidiary, that would be a different case. If
12 this were the trustee, as it was at one point, suing, that
13 would be a different case.
14 But now, the only plaintiffs left are the plaintiffs
02:22PM 15 who were involved in the fraud that they're now suing on. And
16 it just makes no sense, Your Honor.
17 Mr. Alston has speculated about how it is that the
18 \$3-1/2 million became a \$400,000 house and what the
19 machinations were. This has been the source of ongoing
02:22PM 20 frustration for us, Your Honor, because Mr. Alston's had the
21 benefit of many days of depositions with the principals of the
22 old Sports Shinko regime, including Toshio, Satoshi, Tsugio
23 Fukuda, all of the individuals listed on that privilege log.
24 We've seen one deposition of Satoshi that they
02:23PM 25 released. Other than that, we're left to wonder. What was

1 Toshio thinking? We have no idea. Mr. Alston knows, and I
2 would hope in the interest of candor we would at some point be
3 able to find that out.

4 THE COURT: You're asking for a 56(f) delay --

02:23PM 5 MR. MARKS: No, I'm not, Your Honor.

6 THE COURT: -- in your own motion?

7 MR. MARKS: I'm certainly not. I don't think that's
8 necessary, but I think -- I do think it just -- you know, it
9 calls into question some of the many issues that lie ahead in
02:23PM 10 the case, if nothing else, Your Honor.

11 I'm particularly baffled by the argument that
12 Mr. Alston made in his reply to Mr. Bordner's motion and again
13 today about future creditors. Until that reply memo was filed,
14 from the time this proceeding was begun over two years ago, it
02:23PM 15 was our understanding that there were intercompany notes that
16 were written years ago which is the basis for the claim.

17 Is there now a new creditor claim? Does Southwind
18 have a note? If so, why isn't Southwind suing? Why is Sports
19 Shinko suing? I mean, this whole idea about a future creditor
02:24PM 20 doesn't fit the facts as we understand them; and it certainly
21 doesn't fit the pleadings. So, I'm not sure where all that
22 begins and ends other than sort of a -- you know, a last ditch
23 attempt --

24 THE COURT: Well, if Sports Shinko (USA) had loans out
02:24PM 25 to subsidiaries that were a debt to Sports Shinko (USA) and

1 Southwind purchased stock in USA or -- and its parent --

2 MR. MARKS: But that's not a new creditor, Your Honor.
3 That's a new owner of an existing owner.

4 THE COURT: They would take over -- they would take
02:24PM 5 over that indebtedness, wouldn't they?

6 MR. MARKS: Yeah, but that's not a new debt. That
7 section applies to a new debt, not to -- not to a new owner of
8 an old debt. The same rules apply, Your Honor.

9 And, again, you know, looking back, Sports Shinko
02:24PM 10 Japan was owned by Toshio and his three sons. There was also a
11 corporate shareholder that was owned, in turn, by Sports Shinko
12 Japan.

13 THE COURT: So, it's your position that a new owner
14 cannot be a new creditor?

02:25PM 15 MR. MARKS: Unless there's some novation -- is there a
16 new debt? Is there -- you know, I mean, if they've
17 manufactured new debt, I suppose we could talk about --

18 THE COURT: Is that what the act says, a new owner
19 can't be a new creditor --

02:25PM 20 MR. MARKS: I think the --

21 THE COURT: -- because they -- because they take over
22 the position of the ownership --

23 MR. MARKS: I don't think the --

24 THE COURT: -- where there is debt?

02:25PM 25 MR. MARKS: I don't have the statute in front of me,

1 Your Honor; but I don't believe that that's how that provision
2 works at all. I believe it applies to debt that's created
3 subsequently. I -- I don't know.

4 (Off-the-record discussion.)

02:26PM 5 MR. MARKS: You know, we've looked long and hard at
6 this statute; and we're quite surprised to this see this new
7 analysis. I don't think it applies to a new owner of an
8 existing creditor. I think the -- if the debt existed
9 previously, the debt is what it is.

02:26PM 10 And, again, if you look, for example, at real estate
11 transactions, which I think is the most common analogy that I
12 can offer to the Court for this purpose, when there is a cloud
13 on title that's recorded, the buyer takes subject to the cloud.

14 Likewise, here, the buyer took with knowledge of the
02:26PM 15 alleged bad acts of Toshio. That was the predecessor
16 management. And at the time of this transaction, none of the
17 parties to this litigation were hurt. If there were a trustee
18 who were coming in to sue on behalf of general creditors, I
19 would understand that. If it were a Japan bank suing, I would
02:26PM 20 understand that. And this would -- this motion wouldn't be
21 before the Court.

22 THE COURT: Well, I don't know what -- what all was
23 involved in the Japanese bankruptcy, what other assets these
24 companies had that went to creditors.

02:27PM 25 MR. MARKS: I believe none, Your Honor. I -- my

1 understanding is that the -- it may be --

2 THE COURT: But, I mean, if there were other assets
3 that went to the creditors, then the Sports Shinko companies
4 were hurt by not having the assets -- or not having had these
02:27PM 5 Hawaii properties bring the full fair value.

6 MR. MARKS: And if the creditors who were hurt were
7 suing, this motion wouldn't be before the Court. The
8 problem -- the fatal flaw with this motion is that a creditor
9 who was complicit in the alleged fraud is suing the transferee.
02:27PM 10 It -- it takes the law -- the well-established law of
11 fraudulent transfer and turns it upside down.

12 We've cited to the -- the very first case reported in
13 Hawaii reports.

14 THE COURT: Back in the 1800s?

02:28PM 15 MR. MARKS: 1848, I believe it was, Your Honor, the
16 very first case that talk -- it was a fraudulent transfer case
17 and it speaks about the just claims of honest creditors.
18 That's the difference between this case and a normal fraudulent
19 transfer case. And we believe the motion should be granted for
02:28PM 20 that reason.

21 Thank you, Your Honor.

22 THE COURT: Thank you. Well, I'm ready to rule. I am
23 going to deny the motion for summary judgment because I find,
24 No. 1, the Hawaii Uniform Fraudulent Transfer Act does not
02:28PM 25 exclude from its definition of creditors those creditors that

1 are corporate parents of the debtor and, No. 2, that there are
2 genuine issues of material fact that underline a determination
3 of whether Toshio's knowledge and intent can be imputed to the
4 plaintiff.

02:28PM

5 I will deny plaintiff's request for a Rule 56(f)
6 continuance as unnecessary since this Court is denying the
7 motion for summary judgment.

02:29PM

8 And I will grant the plaintiff's motion to strike the
9 untimely joinder of Mr. Mukai, as I find that the joinder is a
10 substantive joinder. And I'm only striking it to the extent
11 that I find that it is a substantive joinder, not otherwise,
12 and it was filed well past the deadline set by the local rules.

13 But I will file a written order, and I'm sure we'll
14 meet again on numerous occasions.

15 (Proceedings concluded at 2:29 p.m.)

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1 COURT REPORTER'S CERTIFICATE

2 I, Sharon Ross, Official Court Reporter, United
3 States District Court, District of Hawaii, do hereby certify
4 that the foregoing is a correct transcript from the record of
5 proceedings in the above-entitled matter.

6 DATED at Honolulu, Hawaii, March 24, 2005.

7

8 /s/Sharon Ross

9 SHARON ROSS

10 CSR 432, RPR, CRR

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